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APPENDIX A:
ORDER ON MOTION TO ALTER OR AMEND JUDGMENT

IN THE COURT OF COMMON PLEAS
TWELFTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE
C/A NO: 2003-CP-21-1347

JEROME MITCHELL, JR.
PLAINTIFF,

VS.

FORTIS INSURANCE COMPANY,
DEFENDANT.

ORDER

This matter comes before the Court on Defendant's Motion to Alter or Amend Judgment Pursuant to Rule 59(e). The Motion asserts an initial argument which is not numbered, in addition to six (6) enumerated grounds for relief. Each will be addressed in turn.

In its initial unnumbered argument, Defendant asserts that the Florence County Clerk of Court improperly enrolled the jury's verdict as a judgment, bearing Judgment Roll number 119832, without entering a new judgment form or an amended judgment form after Plaintiff elected his remedy. The jury awarded $36,600 (Thirty-six thousand six hundred dollars) in actual damages on the breach of contract cause of action; and $150,000 (One hundred

fifty thousand dollars) actual damages and $15,000,000 (Fifteen million dollars) punitive damages on the bad faith cause of action. Defendant made a post-trial motion to require an election, and Plaintiff elected to recover the actual and punitive damages awarded on the bad faith cause of action. The Court confirmed that election by Order dated July 19, 2006. In the Court's view, that Order had the legal effect of amending the judgment so as to delete the $36,600 (Thirty-six thousand six hundred dollar) award for actual damages on the breach of contract cause of action. It would be superfluous to require a separate formal amendment of the judgment, since the July 19, 2006 Order confirms that Plaintiff elected the verdict for bad faith; thereby rendering moot the award of damages for breach of contract.

1. Defendant asserts that this Court failed to conduct a post-trial review of the jury's punitive damages verdict on a *de novo* basis. Defendant cites *Cooper Industries, Inc. v. Leatherman Tool Group*, 532 U.S. 424, 121 S.Ct 1678 (2001) for the proposition that a trial court must conduct a de *novo* review of a punitive damages verdict. That is technically incorrect. In *Cooper Industries, supra,* the Court actually held that the Ninth Circuit Court of Appeals must perform a *de novo* review of the federal trial court's review of a punitive damages verdict. Nevertheless, this Court did conduct its own independent *de novo* review of the evidence and made findings and conclusions which were initially stated on the record in open court, then reduced to writing and expanded upon in the July 19, 2006 Order. The Court's references to evidence adduced at trial and permissible jury inferences reflected the Court's analysis of the evidence, the justification for

the jury's verdict and the Court's own findings and conclusions. Similar analyses have been performed by numerous appellate courts including justices of the U.S. Supreme Court. See *State Fm Mutual Insurance Company, Inc. v. Campbell*, 538 U.S. 408, at 430 et seq., 123 S.Ct 1513 at 1527 et seq. (GINSBERG, J., dissenting); *Hundley v. Rite Aid of South Carolina, Inc.*, 339 S.C. 285, 529 S.E.2d 45 (Ct. App. 2000). To avoid any potential misunderstanding of the Court's five references to evidence and permissible inferences in the July 19, 2006 Order, addressed in the Defendant's Motion on p.2 lines 4-8, the Court hereby clarifies that in its *de novo* review of the evidence underlying the punitive damages award, the Court expressly finds that: (a) Defendant Fortis either destroyed or concealed documentation of Mary Wiggins' phone call to Kate Stephens; (b) Defendant did originally have access to or possession of the May 2002 lab report and initial records from Dr. Shea which definitively established the date of Plaintiffs diagnosis and treatment in 2002, but chose to ignore and conceal them when it decided to rescind the policy; (c) Defendant requested only itemized bills directly from Dr. Shea, but no records, because Defendant already had possession of or access to such records; (d) Defendant did engage in a pattern of secrecy and concealment in this case; (e) Defendant's general counsel did insist that members of the rescission committee conceal the identity of the persons present and involved in making a decision to rescind a Fortis health insurance policy.

2. Defendant also contends that the Court erred in considering the ratio of punitive damages to potential harm, rather than restricting its analysis to the ratio of punitive damages to the actual damages awarded by the jury in this case. The Court did

evaluate the punitive damages award by comparing the ratio of punitive damages to the potential harm Plaintiff might have suffered from Defendant's bad faith rescission. That is in accord with numerous controlling precedents from the U.S. Supreme Court and the South Carolina appellate courts. *See, e.g., TXO Production Corporation v. Alliance Resources Corporation*, 509 US. 443,113 S.Ct. 271 1 (1993); *Hundley v. Rite Aid, supra.*

Defendant argues that *TXO Production* has no precedential value, because it was a plurality opinion. The Court acknowledges that *TXO* was a plurality opinion, but disagrees that it has no precedential value. Defendant ignores that the U.S. Supreme Court has steadfastly maintained after *TXO* that the ratio to be considered is between punitive damages and actual or potential damages caused by a Defendant.

In *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) the Plaintiff had purchased a BMW automobile believing it would be in new and pristine condition, when it had in fact sustained presumed acid rain damage in transit from the factory to the dealer. The BMW vehicle had been repainted to cover up the damage; but in accordance with corporate policy that fact was not disclosed to the Plaintiff. The jury awarded $4,000 (Four thousand dollars) actual damages and $4,000,000 (Four million dollars) punitive damages, the latter being reduced to $2,000,000 (Two million dollars) by the Alabama Supreme Court. The U.S. Supreme Court vacated the reduced punitive damages award as being excessive under its due process analysis. In doing so, however, the Court favorably cited the use of the "potential harm" analysis in TXO and based its decision in part

on the fact that neither Dr. Gore nor any other BMW purchaser "was threatened with any additional harm by BMW's nondisclosure policy." *BMW v. Gore, supra*, 517 U.S. at 581, 582. Unlike *Gore*, in this case, Defendant's wrongdoing threatened Plaintiff with potential additional harm much greater than his actual damages, thus supporting a higher award of punitive damages.

The Court in *State Farm v. Campbell, supra*, identified the second *Gore* guidepost for reviewing the constitutionality of punitive damages awards to be: "the disparity between the actual or potential harm suffered by the Plaintiff and the punitive damages award." *State Farm* v. *Campbell, supra*, 538 U.S. at 418. In applying this second *Gore* guidepost, the Court in *State Farm v. Campbell* emphasized that "[wle have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award." (Emphasis in original.) *Id*, at 424-425.

In *James v. Horace Mann Insurance Co.* (Opinion No. 26231, *Shearhouse Advance Sheet*, No. 45, p.24, filed November 27, 2006), the South Carolina Supreme Court recognized that the ratio to be evaluated is between punitive damages and actual or potential damages. This principle is well established, and Defendant's arguments to the contrary are without merit.

Defendant also argues, incorrectly, that *TXO* applies only where the Defendant attempts a tort which fails. In so arguing, Defendant confuses two types of potential damage: (1) that from an attempted tort which fails; and (2) that from a tort

which succeeds in part but causes less damage than it foreseeably may have caused. Both types are involved in this case.

As to the first type of potential harm, an attempted tort which fails, Defendant asserts that its tort against the Plaintiff was successful, and that Plaintiffs potential damages should therefore not be considered when analyzing the propriety of the punitive damages award in this case. The Court views Defendant's tort differently. The Defendant's tort may arguably have succeeded for the three years during which Plaintiff's health insurance policy was wrongfully rescinded. However, the Court has serious doubts that the Defendant's goal in committing the tort was to rescind Plaintiff's policy for only three years. To the contrary, the Court finds that the Defendant's goal in wrongfully rescinding the policy was to rescind the policy in perpetuity. Defendant reinstated the policy only in the face of litigation, after approximately three years of rescission. To the extent that Defendant ultimately reinstated the policy, therefore, the Court finds that the Defendant's tort failed. In evaluating the propriety of the punitive damages award, this Court must consider the potential harm to Plaintiff if the policy had been successfully rescinded throughout his lifetime.

The second type of potential harm involves a tort which succeeds to some extent, but which involves less actual harm than could have potentially and foreseeably resulted. In *TXO, supra*, the U.S. Supreme Court cited a hypothetical which exemplifies this form of potential harm:

For instance, a man wildly fires a gun into a crowd.

By sheer chance, no one is injured and the only damage is to a $10 pair of glasses. A jury reasonably could find only $10 in compensatory damages but thousands of dollars in punitive damages to teach a duty of care. We would allow a jury to impose substantial punitive damages in order to discourage future bad acts. [Citations omitted] *TXO, supra*, 509 *U.S.* at 459-460,113 S.Ct at 2721.

In evaluating the propriety of the punitive damages award, it is thus also proper for the Court to consider potential harm that might have resulted from a successful tort, where the victim manages to avoid the worst potential damages. In this case, but for the Plaintiff's actions in mitigating his damages by (1) obtaining free health care for his HIV from Hope Health, and (2) procuring the services of legal counsel to fight Defendant's wrongful rescission of his policy, the potential and foreseeable harm to the Plaintiff from Defendant's wrongful rescission would have involved a tumultuous decline in his health and his eventual untimely and miserable death from AIDS.

Defendant further argues, erroneously, that the Court should only consider the potential harm to Plaintiff that occurred within the three year rescission period, rather than the potential harm to Plaintiff throughout his lifetime. Defendant bases that argument on the fact that Defendant finally reinstated the policy during litigation, shortly after the policy had been rescinded for three years. In making these arguments, Defendant fails to acknowledge that the potential harm from wrongfully rescinding Plaintiff's policy includes the potential harm to Plaintiff from the intended permanent rescission. The mere fact that Defendant

decided to reinstate the policy after it became involved in litigation of the matter does not entitle Defendant to truncate the measure of Plaintiff's potential damages as of the reinstatement date. The potential harm to Plaintiff from the wrongful rescission was a lifetime of no coverage and the adverse health consequences of having no coverage, including an early demise from AIDS.

Next Defendant argues, erroneously, that Plaintiff's potential death cannot be considered as part of the potential harm from its wrongful rescission, because (1) Defendant did not cause Plaintiff to contract HIV; (2) it asserts that Plaintiff could have gotten health insurance from another provider; and (3) it asserts that free medical care for HIV patients is widely available and would have prevented Plaintiff's death. As to the first prong of this argument, it is of course true that Defendant did not cause Plaintiff to contract HIV. However, Defendant's wrongful rescission ended Plaintiff's existing plan for receiving private treatment from Dr. Shea. If Plaintiff had been unable to obtain substitute treatment, a foreseeable potential harm from the wrongful rescission, Plaintiff's HIV would have become AIDS within two years; and Plaintiff would have died within one to two years thereafter. As to the second prong of Defendant's argument, Plaintiff's HIV status and the fact of the rescission of his Fortis policy made it highly unlikely that he would be able to obtain comparable insurance from any other health insurance carrier.[1] Whether

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[1] Evidence was presented that Defendant refuses to provide health insurance at any price to an HIV patient on an individual policy, such as Plaintiff's, and that its premium increases 4,000% (Four thousand percent) when

Plaintiff could fortuitously obtain other coverage is not the issue.[2] The issue is whether the potential harm to Plaintiff from the wrongful rescission of his policy by Defendant included his untimely death, and the Court finds that it did. The third prong of Defendant's argument asserts that Plaintiff did not face potential death from Defendant's wrongful rescission, because there were allegedly many sources of free medical care available to HIV patients such as the Plaintiff. A part from Plaintiff's obtaining free health care from Hope Health, the Court notes that there was no evidence presented at trial of the availability of any other free medical care to Plaintiff. At any rate, the availability of free health care to Plaintiff at Hope Health or anywhere else independent of the wrongdoer represents a gratuitous service and a collateral source which cannot be used by a tortious Defendant to limit its liability. "The collateral source rule provides that

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it is forced to cover a HIV patient under a group plan. Plaintiff's initial premium for his policy with Defendant was approximately $90 (Ninety dollars) per month. A 4,000% (Four thousand percent) increase in Plaintiff's premiums would approximate a premium of $3,600 (Three thousand six hundred dollars) per month; or $43,200 (Forty-three thousand two hundred dollars) per year.

[2] Evidence was presented at trial that Plaintiff had recently obtained employment with Blue Cross Blue Shield (hereinafter "BC/BS") as a computer operator. There is nothing in the record to suggest Plaintiff's BC/BS coverage was comparable to the Fortis coverage nor was there any evidence that it would have provided Plaintiff benefits for HIV. Plaintiff testified that he had never submitted any claim to BC/BS and did not intend to do so. Plaintiff further testified that he desired to keep BC/BS and his co-workers from learning of his HIV status.

compensation received by an injured party from a source wholly independent of the wrongdoer will not reduce the amount of damages owed by the wrongdoer." *Rattenni v. Granger,* 298 S.C. 276,379 S.E.2d 890 (1989); *Young v. Warr,* 252 S.C. 179,165 S.E.2d 797 (1969); *Powers v. Temple,* 250 S.C. 149,156 S.E.2d 759 (1967). This rule has been liberally applied in South Carolina to preclude the reduction of damages. *See Otis Elevator v. Hardin Construction Co.,* 316 S.C. 292,450 S.E.2d 41 (1994) (contractual right to indemnification not defeated by fact that loss was actually paid by an insurance company); *Rattenni v. Granger, supra* (tortfeasor's liability for damages not reduced by proceeds from underinsured motorist coverage); *Powers v. Temple, supra* (tortfeasor's liability for damages not reduced by disability payments from employer); *New Foundation Baptist Church v. Davis,* 257 S.C. 443, 186 S.E.2d 247 (1972) (tortfeasor's liability for damages not reduced by value of gratuitous repairs). For the same policy reasons, the potential availability of gratuitous services or collateral sources cannot be used by a Defendant in a post-verdict review of a punitive damages award to limit the potential damage from the Defendant's wrongful conduct and thereby reduce its punitive damages exposure. Defendant's argument that its wrongful rescission did not have the potential to cause Plaintiff's death, since gratuitous care was available at Hope Health represents an effort to divert to Defendant the benefit of Hope Health's generosity intended for the Plaintiff. *New Foundation Church v. Davis, supra.*

Defendant also contends that it was not likely that Plaintiff would ever have received $6,000,000 (Six million dollars) worth of health insurance

benefits under his policy with Defendant. Defendant argues that evidence was presented showing a cost slightly in excess of $1,000,000 (One million dollars) for treatment of Plaintiffs HIV over his lifetime, without taking into account his deductibles and co-payment obligations. Defendant's argument ignores that the estimated lifetime cost of providing HIV care presented at trial was conservative in that it used wholesale cost for drugs and certain other items of care, did not include provision for treating any complications or side effects of HIV, did not include provision for new drugs that may be created in the future for better treatment of HIV at a more expensive price, and did not include any provision for treating AIDS, if the Plaintiff's HIV should progress into AIDS. Also, the cost figures presented at trial did not include any cost of treating accidental injuries or other diseases that Plaintiff may experience during his lifetime. Given the Plaintiff's youth, HIV condition, conservative future cost estimates for treating HIV, potential complications and side effects of HIV and the unknown costs of treating other injuries and diseases, the Court concludes that the value of Plaintiff's policy over his lifetime could possibly be as high as the lifetime maximum benefit of $6,000,000 (Six million dollars) under Plaintiff's policy. Moreover, those figures reflected a reduction to present value of estimated future HIV treatment costs. Thus, Plaintiffs potential harm from rescission of his policy includes much more than the loss of health insurance coverage for the $1,000,000 (One million dollars) present value estimate for treating HIV. It is true that Plaintiff would face deductibles and co-pays under his health insurance policy with Defendant, but nevertheless Defendant sold Plaintiff a health insurance policy with the maximum lifetime benefit

of $6,000,000 (Six million dollars). That lifetime maximum benefit represents the high end of the potential insurance coverage loss to Plaintiff from the wrongful rescission of his policy. That $6,000,000 (Six million dollar) maximum lifetime coverage was bargained for as part of the insurance contract. The loss of that coverage because of Defendant's wrongful rescission caused Plaintiff to lose the benefit of continuing coverage up to that maximum amount as long as he paid his premiums.

But for Plaintiff's good fortune in obtaining free medical treatment of his HIV from Hope Health, his death would have most likely occurred within three to four years of the Defendant's wrongful rescission of his policy. Such potential death from AIDS would have been horrific, and would justify $3,000,000 (Three million dollars) or more in actual damages for the reasons described in detail in the Court's prior Order. Similarly, Defendant's wrongful rescission deprived Plaintiff of the $6,000,000 (Six million dollars) lifetime maximum benefit in his policy. That coverage limit was bargained for by Plaintiff and may potentially have been used up during Plaintiff's lifetime because Plaintiff was young, had HIV and faced the normal risks of other injuries and diseases throughout the remainder of his lifetime in addition to the risk of HIV complications including AIDS.

3. Defendant next argues that the Court's July 19, 2006 Order should not have addressed the issue regarding ambiguity about the rescission. Defendant asserts that the rescission date is September 5, 2002, and argues that such date is clear and unambiguous. Defendant further argues that Plaintiff accepted that date and did not previously assert that Defendant's rescission was not completed until the second

rescission committee met in June 2003, or later. Defendant is incorrect. Defendant ignores the evidence from its own employees which established that they did not consider rescission final or complete until long after the rescission letter was mailed. Plaintiff's counsel did address the Court about this issue during trial by requesting a jury charge on that point. Although the Court declined to charge the jury on that specific factual point, the Court recognized Plaintiffs right to proceed with that argument based on the evidence adduced from Defendant's own employees.

4. Defendant also argues that the punitive damages award in this case cannot withstand scrutiny under the third guidepost set forth in *BMW v. Gore, supra,* i.e., a comparison of the punitive damages verdict to other civil penalties. Defendant argues that it is improper for the Court to compare the punitive damages award in this case to punitive damages awards in other cases; and even if it were proper, that the amount of the punitive damages award in this case does not compare favorably with other awards that have been upheld in South Carolina and elsewhere. Defendant's argument ignores that the South Carolina Supreme Court has itself interpreted the third *Gore* guidepost as allowing a comparison between the punitive damages award in the case being appealed with punitive damages awards in other cases. *Atkinson v. Orkin Exterminating Co., Inc.,* 361 S.C. 156, 604 S.E.2d 385 (2004). The Court's favorable comparison of the subject punitive damage award to punitive damages awards in other civil cases was in accord with the approach used in *Atkinson, supra.*

The result is no different if one compares the

punitive damages verdict with the statutory civil penalties for violation of South Carolina law by insurance companies. Under *South Carolina Code of Laws 5* 38-2-10(1), each separate violation of the South Carolina insurance laws is subject to (a) a fine of $15,000 (Fifteen thousand dollars) if not "willful;" (b) a fine of $30,000 (Thirty thousand dollars) if "willful;" and/for (c) suspension or revocation of the insurer's authority to do business in this state. Although it is difficult to put a monetary value on Fortis' authority to continue doing business in South Carolina, the Court may take judicial notice that its authority to engage in the insurance business in South Carolina is a significantly valuable right. Viewed in that light, the punitive damages award of $15,000,000 (Fifteen million dollars) does not seem excessive compared to the statutory civil penalties available under South Carolina law. Moreover, in a recent case our Supreme Court has clarified its conviction that the monetary civil penalties set forth in the statute do not provide a useful comparison for evaluating the propriety of a meaningful punitive damages award in an insurance bad faith case. *James v. Horace Mann Insurance Co., supra.* As the Court noted in *James*, [w] find the statutory penalties are set at 'such a low level, there is little basis for comparing it with any meaningful punitive damages award.' [Citations omitted] *James, supra,* at p.31.

Defendant's argument about lower punitive damages awards being upheld is not persuasive at all. Defendant points out that South Carolina appellate courts have approved several punitive verdicts that were lower than the award in this case; and argues that since lower verdicts have been upheld, the higher punitive damages verdict in this

case is improper. That argument lacks logic, since the approval of lower verdicts in no way indicates that higher verdicts are improper. The Courts in those cases determined that the jury verdicts should not be disturbed but should be given deference. There is no bright line by which to judge a ratio of punitive damages to actual or potential damages, and under well-established law the subject award of punitive damages is easily justifiable for the reasons set forth in the Court's July 19, 2006 Order.

A significant part of the rationale for *de novo* review of the punitive damages award is for the Court to evaluate independently the Defendant's degree of culpability and reprehensibility. This Court determined Fortis' culpability to be extreme and outrageous, and determined that Fortis acted with a high degree of reprehensibility in callous disregard of the adverse effects on Plaintiff's health and life expectancy. The punitive damages award in this case compares favorably within the guidelines approved in other cases by the appellate courts of South Carolina. *See, e.g., Collins Entertainment Corporation v. Coates and Coates Amusement Rental*, 2005 WL 394000 (S.C. 2006); *Hundley v. Rite Aid of SC, Inc.* 339 S.C. 285,529 S.E. 2d 45 (Ct. App. 2000); *Taylor vs. Medinica*, 324 S.C. 200,479 S.E. 2d 35 (1996); *Cock-N-Bull Steakhouse v. Generali Ins. Co.*, 321 S.C. 1, 466 S.E.2d 727(1996). It is also in accord with guidelines approved by the U.S. Supreme Court. *See, e.g., TXO Production v. Alliance Resources, supra.*

5. Defendant asserts that this Court failed to rule on seven (7) of its arguments in the July 24, 2006 Order. Defendant designates those arguments as subparagraph (a) through subparagraph (g). In

addressing those issues, the Court will consolidate subparagraphs (a) through (c), (d) through (e), and *(f)* through (g), addressing each grouping in turn.

The first three of these defense arguments to be addressed are:

(a) Whether $150,000 in compensatory damages are "substantial" or not under *State Farm Mutual Automobile Insurance Co. v. Campbell, 538* U.S. 408,425 (2003);

(b) Whether Plaintiff had been made whole (and any economic damages reimbursed) through the retroactive reinstatement of his policy prior to trial;

(c) Whether the actual damages awarded already contain a punitive element via an award for emotional distress.

Defendant argues that the award of $150,000 (One hundred fifty thousand dollars) in compensatory damages represents a "substantial" award as that word is used in the case of *State Farm Mutual Automobile Ins. Co. v. Campbell, supra*. That is, Defendant argues that the amount of compensatory damages is disproportionately high compared to the actual damages suffered by Plaintiff, and that the award for compensatory damages has been inflated so as to contain a punitive element. The Court disagrees. As in *James, supra*, there was ample evidence of actual damages to support the compensatory damages award. See the Court's July 19, 2006 Order, page 24, line 8-page 27, line 10. As in *James*, the compensatory damages verdict included non-economic damages, but that

was necessary to make Plaintiff whole. The compensatory damages award deemed "substantial" in *State Farm v. Campbell, supra,* was $1,000,000 (One million dollars),[3] far more than the compensatory damages award in this case. That case, as well as the *James* case, involved economic damages resulting from a failure to settle within policy limits, whereas this case involves rescission of health insurance in the context of Plaintiff's urgent need to receive treatment for HIV to avoid a serious decline in his health status leading to death within three to four years. The Court concludes the award of $150,000 (One hundred fifty thousand dollars) actual damages in this case was amply warranted by the evidence of actual harm sustained, and does not contain any punitive element. Thus, the $150,000 (One hundred fifty thousand dollars) award of actual damages was not "substantial" within the meaning of *State Farm v. Campbell, supra.* Indeed, this case is more akin to those in which "a particularly egregious act has resulted in only a small amount of economic damages." *State Farm* v. *Campbell, supra, 538 US* at 410. The U.S. Supreme Court recognized that due process constraints are relaxed concerning permissible ratios in such cases. This case also fits into the line of cases where punitive damage restrictions are relaxed where "monetary value of non-economic harm might have been difficult to determine." *BMW v. Gore, supra,* 517U.S. at 582; *Mathias* v. *Accor Economy Lodging Inc.,* 347 *F.* 3d 672 (7" Cir. 2003); *Hundley v. Rite Aid supra,* 529 *S.E.* 2d at 62. Limiting punitive damages in this case to ten times the actual damages award would represent a defense victory, and thus encourage

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[3] Reduced from the jury award of $2,000,000 (Two million dollars) by the Utah Supreme Court.

rather than deter Defendant's wrongful conduct.

Defendant also contends that the punitive damages award is excessive because of its argument that Plaintiff has been made whole through the retroactive reinstatement of his policy and payment of prior claims. The Court disagrees. Through no fault of his own, Plaintiff went without health insurance coverage in excess of three years. A health insurance consumer purchases the insurance to obtain peace of mind that he will have affordable healthcare. When an insurer wrongfully rescinds a health insurance policy, and maintains the rescission in excess of three years, that causes damages which cannot be remedied by merely reinstating the policy and repaying those bills that were incurred during the three year period. *See, e.g., University Medical Associates of the Medical University of South Carolina v. UnumProvident Corp.*, 335 F.Supp.2d 702 (D.S.C. 2004); *Goodson v. American Standard Insurance Company of Wisconsin*, 89 P.3d 409 (Col. 2004). Moreover, after Fortis informed Plaintiff his health insurance policy had been reinstated, Plaintiff attempted to use his policy at a drugstore and was informed the policy benefits were still not available to him, further undermining Plaintiff's peace of mind. The Court thus finds that reinstatement of the policy and payment of prior bills incurred did not make Plaintiff whole. It is worth noting that in *State Farm v. Campbell, supra,* State Farm had paid the excess verdict rendered against Campbell in the underlying case, and the U.S. Supreme Court recognized that Campbell was nevertheless entitled to actual and punitive damages, albeit a lower amount of punitives.

The next two defense arguments to be

addressed are:

(d) How Plaintiff suffered any economic harm when he testified that he would have gone to the free clinic regardless of whether the Policy was rescinded or not;

(e) How Plaintiff suffered any emotional distress by being embarrassed by going to the free clinic when he testified that he would have gone regardless of the rescission to avoid the co- pays and deductibles (and indeed went to the free clinic prior to the rescission).

Defendant misconstrues the evidence about Plaintiff's pre-rescission contact with Hope Health. Plaintiff never testified that he transferred his primary treatment to Hope Health prior to rescission or that he would have gone to the free clinic for his primary treatment if the policy had not been rescinded. Plaintiff testified that Dr. Shea, his first infectious disease specialist, and his treating physician under his Fortis policy, recommended prior to rescission that Plaintiff request help from Hope Health with the co-pay portion of the price for prescription drugs needed for treatment of his HIV. There was no testimony that Hope Health would be paying all of Plaintiff's bills; just the minimal involvement required to permit Hope Health to help Plaintiff with the co-pay portion of his prescription drug expense. There was no testimony that Hope Health would have provided any treatment, absent rescission, except to the limited extent of its involvement necessary to provide financial subsidies for the cost of Plaintiff's prescription drugs. Having had Hope Health assist Plaintiff, prior to the rescission, with payment of the co-pay portion of

required HIV drugs does not in any way indicate a lack of economic harm from the rescission. Defendant's wrongful rescission and refusal to pay Dr. Shea's bills caused Plaintiff to lose the ability to be treated by Dr. Shea, Plaintiff's personal choice of physician, at Dr. Shea's private office. The evidence shows Plaintiff would have continued to use his Fortis health insurance for his HIV treatment at Dr. Shea's private office, including the insurance contribution toward the cost of prescription drugs, but for the bad faith rescission of the policy by Fortis.

Similarly, the bad faith rescission did cause Plaintiff emotional distress. Plaintiff was previously distraught about his diagnosis of HIV, but prior to rescission he at least was confident he had health insurance to help pay for quality treatment. His doctors impressed upon him the absolute necessity of regular daily compliance with his treatment regimen to prevent his immune deficiency status from worsening dramatically and spiraling out of control. Defendant's bad faith rescission removed that confidence that Plaintiff would be able to maintain regular care to maintain his current immunity status. The sudden, undeserved loss of his health insurance threatened Plaintiff's ability to comply with his regular treatment plan and induced a fear in Plaintiff that he would not get appropriate treatment but would face a tumultuous decline in his health status leading to an early death. Plaintiff knew Hope Health had helped him with the co-pay portion of his drug bas, but he did not know at the time of rescission that Hope Health may be able to provide his primary treatment. After rescission, four months passed before Plaintiff was able to schedule an office visit with the Hope Health physician on January 18, 2003 in the effort to transfer his primary

treatment to Hope Health. *See* Plaintiffs Trial Exhibit 50a. Thus, the Court finds that Defendant's wrongful rescission did cause Plaintiff severe mental and emotional anguish.

There was no evidence of Plaintiff transferring his primary care to the free clinic before rescission. His only contact with Hope Health prior to rescission was by requesting financial help with the co-pay portion of his prescription drug bills, and the minimal involvement required for Hope Health to provide that assistance. Plaintiff's transfer of primary treatment to Hope Health was not made until after rescission; and was necessitated by that bad faith rescission of Plaintiffs policy. The only personal visit by Plaintiff to Hope Health prior to rescission was on July 2, 2002 for the initial examination[4] needed to get onto the program to assist with prescription drug co-pays. The embarrassment Plaintiff testified about suffering from going to the free clinic rather than Dr. Shea's private office for his primary treatment occurred after the rescission, not before. Prior to rescission, Plaintiff bad only the one-time visit to qualify for financial help from Hope Health with drug co-pays.

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[4] See document Bates-stamped Hope for Pee Dee P 00022, which was presented to the Court by Defendant prior to the hearing on its Rule 59(e) Motion. In it, Dr. Htay ordered certain laboratory tests to be done six weeks later, to check on the efficacy of drugs provided by Hope Health. The lab work was done on August 15, 2002 by Labcorp Holdings, and submitted to Defendant by Fortis for payment. See Plaintiffs Trial Exhibit 15. Defendant made no payment thereon. *Id.* However, the fact that Plaintiff submitted the bills to Defendant for payment evidences his intent to have continued using his Fortis policy.

The embarrassment Plaintiff testified about suffering from going to the free clinic rather than Dr. Shea's private office for his primary treatment occurred after the rescission, not before. Prior rescission, Plaintiff had only the one-time visit to qualify for financial help from Hope Health with drug co-pays. His next visit was not until January 8, 2003, four months after the rescission letter. *See* Plaintiff's Trial Exhibit 50a.

The next two defense arguments to be addressed are:

(f) Whether the net worth evidence should have been submitted to the jury or should have been merely considered by the Court post-verdict; and

(g) Whether the net worth evidence should have been limited to South Carolina earnings as opposed to nationwide earnings.

Defendant complains that evidence of its net worth may properly be considered only by the Court post-verdict, but should not be submitted to the jury. The Court disagrees. Absent knowledge of the Defendant's financial status, it would be impossible for the jury (a) to determine a corporate defendant's ability to pay; or (b) to fashion an appropriate amount of punitive damages reasonably calculated to punish and deter. Our appellate courts have expressly approved testimony by Dr. Wood presented to jurors about the financial condition of corporations that is quite similar to that presented in this case. See, e.g. *Cock-N-Bull Steakhouse, Inc.*, 321 S.C. 1, 466 S.E.2d 727 (1 996); *Orangeburg Sausage v. Cincinnati Ins. Co.* 316 S.C. 331, 450 S.E.2d 66 (Ct.

App. 1995) In fact, the testimony of Dr. Wood approved by our Supreme Court in *Cock-N-Bull* went much farther than his more restrained testimony in this case.

The Court is not aware of any U.S. Supreme Court case which holds that jurors should not hear testimony of a defendant's net worth. Defendant cites no authority in its Motion to support that argument. U.S. Supreme Court precedent supports the admission of such evidence. *See, e.g., Pacific Mutual Life Insurance Company v. Haslip*, 499 U.S. 1, 21-22, 111 S.Ct. 1032, 1045. Under South Carolina law the defendant's ability to pay is an important factor to use in determining whether a punitive damages award is reasonable. *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E. 2d 350 (1991).

Defendant also contends that evidence of its net worth should have been limited to South Carolina earnings as opposed to nationwide earnings. The Court disagrees, and notes that Fortis has not cited any authority to support that proposition either. The U.S. Supreme Court in *State Farm v. Campbell, supra*, cautioned that a particular state does not have a legitimate interest in punishing a corporation for conduct outside the territorial limits of that state, but that holding does not in any way preclude the admission of net worth evidence. Evidence of a corporation's total net worth is probative of that corporation's ability to pay an award of punitive damages, and the amount of punitive damages needed to effectively punish and deter its wrongful practices.

The Court questions whether earnings in a particular state of a multi-state or multi-national

corporation can even be determined in accordance with traditional accounting principles, but if it can, that figure would have no probative value. If earnings by a multi-state or multi-national corporation are allocated to a particular state for trial purposes, the resulting figures would most likely be disproportionately low compared to a party's true earnings, net worth and ability to pay. Projecting ability to pay from such limited information would thus likely lead to punitive awards that are not rationally calculated to punish and deter.

Moreover, there are practical problems with shifting the focus from actual net worth or net earnings to individual state allocations of net worth or net earnings. That would invite use of unorthodox accounting methods and/or potential manipulation of financial data by a defendant, which would subvert rather than serve the interests of determining a proper punitive damages award.

In this case, Defendant did not proffer any evidence at trial of its earnings or net worth attributable to its activities in South Carolina. However, Defendant belatedly attempted to enter an affidavit of Brian N. Rees as an attachment to its post-trial motions. I declined to consider the affidavit. Mr. Rees was not named as a witness, so Plaintiff had no opportunity to depose or cross-examine him. Defendant failed to offer the contents of the affidavit for jury consideration. Moreover, the affidavit did not present any helpful information. Even though Defendant presented the affidavit in support of its argument that the evidence of Defendant's ability to pay punitive damages should have been limited to South Carolina earnings, the

affidavit of Mr. Rees focuses on an entirely different concept, that of estimated "underwriting profits (before taxes) and/or losses for 2003-2005." The affidavit does offer any definition of "underwriting profits" or any explanations for how estimates were made for "underwriting profits (before taxes) and/or losses" for such years. Mr. Rees' affidavit substantiates the Court's concerns about encountering unorthodox accounting methods and/or potential manipulation of financial data if courts were to try to allocate net worth or earnings to an individual state, when the party's business is multi-state or multi-national.

The trial testimony of Dr. Wood regarding Fortis' financial status was not controverted in any way by Fortis at trial. The Court finds that Dr. Wood's testimony proves Fortis has the ability to pay the punitive damages verdict in this case, and concludes that evidence of its ability to pay was properly introduced for jury consideration. That evidence was necessary for the jury to determine the size of a punitive damages award needed to punish and deter Defendant's misconduct.

6. Defendant reiterates its prior arguments on any other issues covered in the post- trial motions. It is difficult to understand the substance of this ground, since it appears to be a "catch-all" category of unspecified prior arguments. However, the Court stands by its prior decisions on all issues for reasons previously set forth.

NOW THEREFORE, IT IS SO ORDERED, ADJUDGED AND DECREED, that the Defendant's Motion *to* Alter or Amend the Judgment under Rule 59(e) shall be, and the same is hereby DENIED.

AND IT IS SO ORDERED, this 25th day January of 2007.

/s/The Honorable Michael G. Nettles
Presiding Judge
Twelfth Judicial Circuit